No. 15,142

United States Court of Appeals

For the Ninth Circuit

LEETA A. LLOYD,
Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY, a Corporation,
Appellee.

APPELLANT'S REPLY BRIEF.

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COMMENT ON APPELLEE'S STATEMENT OF THE CASE AND AUTHORITIES.

Statement of the Case.

At pages 2 and 3 of appellee's brief, appellee has "twisted" (as that term is well known among insurance people) the factual record. By dogged repetition, by statement of half-truths and by devious incomplete citation and reference to the Record Transcript, the company has sought to establish "date of issue" of its insurance policy as of January 1, 1953, a date less than two years from the suicide of the insured.

The *question at issue is* whether payment of a periodic premium, demanded and received at the time of application, makes effective insurance coverage from the date of medical examination of the insured.

"Date of issue" of a policy *is not determined,* for the purpose of commencement of coverage, by a request for dating the policy. The insurance, for which Lloyd made application, went into effect and he was covered from the date he passed the medical examination, to-wit: December 11, 1952, which was ten days after the two year period specified in the suicide provision of the policy.

The argument of appellee is wholly specious and untenable that the note for a full month's premium which the agent of appellee demanded and accepted on December 6, 1952 with the application was simply a token of good faith that Lloyd would accept and pay the premium for the policy if and when it was issued. The receipt of the "full one month's premium" was acknowledged, made part of the policy ultimately issued, and the agent testified a receipt therefor was given to the insured. (TR, bottom page 91.)

Comment on Authorities.

As is pointed out at page 14 of appellant's opening brief, the court, in

Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167; 68 L. Ed. 235; 44 S.Ct. 90

did not hold that "date of issue" is the date of the testimonium clause or the date (in this case January 1, 1953) when the policy by its terms as therein stated went into effect, but *is the date most favorable to the insured* when there is a doubt or ambiguity as to when the risk commenced.

See also,

Stroehmann v. Mutual Life Ins. Co. of New York, 300 U. S. 435, 81 L. Ed. 732, 57 S.Ct. 607.

In

Horwitz v. New York Life Ins. Co., (9th Cir. 1935) 80 F. 2d 295

cited in appellee's brief at pages 5, 6, 8 and 9, this court construed the phrase "date of issue", stating:

> "If there is any ambiguity as to whether or not the words 'its date of issue' refer to the previous agreement or to the words 'said policy', the ambiguity must be resolved in favor of the latter construction, for, so construed, the contestability period expired at the date most favorable to the insured."

This court in that case also said that in view of the application making the insurance effective from and after the date of application, "date of issue", as used in connection with commencement of the incontestability clause could mean: (a) date of application; or (b) anniversary date of policy; or (c) date on which it is purported on its face to be signed; or (d) date of issue and receipt by the insured. The court then said:

> "The ambiguity arises from the act of the draftsman in so framing the policy that, under conditions likely to arise, a question of construction also arises as to which of the four circumstances in the creation of the insurance contract fixes the date of issue."

The court held the resolution of the doubt should be in favor of the insured, referring to the *Hurni* case, supra.

FURTHER ARGUMENT IN SUPPORT OF APPELLANT'S POSITION.

As the construction of the policy is governed by the law of California and the decisions of the courts of California,

> *Ruhlin v. New York Life Insurance Company,* 304 U.S. 202, 82 L.Ed. 1290, 58 S.Ct. 860,

this court must apply the law of California with respect to construction of insurance policies, as the policy involved in the case at bar was applied for and delivered in California. The law of California is stated in

> *Ransom v. The Penn Mutual Life Insurance Company,* 43 Cal. 2d 420, 274 P.2d 633,

where the Supreme Court adopted the principle of construction set forth in

> *Gaunt v. John Hancock Mutual Life Insurance Company,* 160 F.2d 599 (certiorari denied 331 U.S. 849, 91 L.Ed. 1858, 67 S.Ct. 1736).

The Supreme Court of California in the *Ransom* case, referring to the *Gaunt* case stated that insurance shall be in force from the date of application if the premium is paid and that an application must be construed as it would be taken by the ordinary applicant; and such a person would assume that he was getting

immediate insurance for his money; and that where the provisions of the application are ambiguous and susceptible of two different constructions the ambiguity must be resolved against the company.

The *Ransom* case is reviewed in 7 Stanford Law Review, 292.

A recent case citing many authorities and applying the rule of the *Gaunt* case is

Liberty National Life Insurance Company v. Hamilton (6th Circuit 1956), 237 F.2d 235.

Articles in 60 Harvard Law Review, 1164, and 15 University of Chicago Law Review 379, are therein cited; also

Stonsz v. Equitable Life Assurance Society (Supreme Court of Pa. 1936), 324 Pa. 97, 187 A. 403, 107 A.L.R. 178.

The court in the *Stonsz* case discusses the reasons why the binder gives immediate coverage.

The article in 60 Harvard Law Review, 1164, which is a note on the *Gaunt* case, supra, points out that unless the binding receipt is regarded as effecting immediate coverage, it will be increasingly regarded as either an ineffective vehicle for carrying out intention, or, at worst an instrument of deception; and that a failure to extend to life insurance the traditional instantaneous coverage long afforded by fire insurance may indicate an unresponsiveness to the type of service the public requires.

Stonsz, supra, points out that the trend of decisions is to treat the binding receipt as giving immediate

coverage, on the theory that if the binding receipt means anything at all, no other result could have been intended by the parties; for, unless applicant was to be protected against death during the interim period, there would be no advantage in paying a premium in advance. And further, if the company did not intend there should be insurance effective pending the date of application and date of approval of the risk and issuance of the policy, then the company would be charging and obtaining a premium for something the applicant did not receive.

The court in *Stonsz,* supra, also said that if construction of the binding receipt is not that the applicant was thereby insured from date of the binder unless a formal policy was issued or the risk declined, then it must be said the binding receipt is at least ambiguous. And, if so, it should be construed against the company, it having been drawn up by the agent of the company upon its printed form.

The *Gaunt* case, supra, is also noted in 15 University of Chicago Law Review 379. This Law Review article points out that the life insurance policy contract, of which the application is a part, is a contract of "adhesion" as the applicant for insurance really has no choice in the bargaining. He must take or leave the printed form. An additional comment on the contract of adhesion appears in the opinion written by Judge John M. Harlan when he was a member of the United States Court of Appeals for the 2d Circuit.

In

Siegleman v. Cunard White Star (2d Cir. 1954), 221 F.2d 189, 202, 204-206,

Judge Harlan points out, at page 205, that in the "contract of adhesion" there is no possibility of real bargaining and that "the courts will do justice by forthrightly, not obliquely, articulating important doctrines of public policy." Appellant submits that it is an important doctrine of public policy that life insurance coverage should commence at the earliest possible moment, for life insurance is of great social benefit and the persons ultimately to benefit from the life insurance policy contract usually have no control over its formation. It is suggested by the author of the note in 15 University of Chicago Law Review, 379, supra, that Judge Hand and Judge Clark in the *Gaunt* case, supra, may have intended to apply a similar principle.

The *Siegleman* case was decided by the same court that decided *Gaunt,* supra, and Judge Clark participated in both decisions.

As Mr. Lloyd had a right to have life insurance coverage begin at the date of medical examination, December 11, 1952, having paid for it to begin then, to construe his request to date the policy January 1, 1953, as a waiver of that right would be to regard Mr. Lloyd as a fool. Why should he not want immediate coverage for his family, especially since he had paid for it? What other explanation can be made for the company's agent taking Lloyd's note?

In *Hart v. Travelers Ins. Co.,* cited at p. 7 of appellant's opening brief, the court said that to condition the insurance on issuance of the policy would be to the disadvantage of the applicant:

> ". . . for he would be paying for insurance for a period during which he was not insured at all, namely, from the date of the binding receipt to the time when the policy should be issued. It would be more advantageous to him to keep his money and pay when the policy was ready to be delivered. This, I am sure, was not the intention of this binding receipt, which was a printed form prepared by the company. Undoubtedly it was to induce the insured to pay the full premium at the time the receipt was to be given. He undoubtedly thought he was getting some advantage by making this full payment at this time. He did not believe that by furnishing this premium in full in advance he was doing something to his disadvantage, paying money for a period when he was not insured at all."

An exhaustive note on the temporary insurance afforded by the binding receipt also appears in 2 *A.L.R.* 2d 943.

CALIFORNIA INSURANCE CODE, SECTION 10115.

The above code section requires insurance coverage to begin "on the date the application was signed by the applicant" if, as in the case at bar, "a payment is made equal to the full first premium at the time an application for life insurance . . . is signed by the applicant and . . . the applicant received at that time a receipt for said payment on a form prepared by the

insurer" provided, as in the case at bar, the insurer "approves the application for the issuance by it of a policy of life insurance on the plan and for the class of risk and amount of insurance applied for . . .". This retroactive coverage begins "on the date the application was signed by the applicant" even though the applicant made a special request in the application to date the policy at a future date.

It was established law in California before the enactment of the Insurance Code provision that, if an applicant was accepted as a risk in accordance with his application and paid the full first premium and died after a date specially requested by him for the policy to take effect but before the policy was issued and delivered, the beneficiary was entitled to recover on the policy even though the particular document had not been physically issued and delivered. To give any meaning to the statutory language making the policy effective as of application date, it is necessary to hold that it means what it says; that is, that insurance becomes effective "on the date the application was signed by the applicant". The retroactive feature of the coverage would be particularly significant when applied to the commencement of the period of incontestability or, as in the case at bar, to the commencement of the two-year suicide period.

December 31, 1956.

Respectfully submitted,

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